STATE OF MICHIGAN
IN THE SUPREME COURT

MICHAEL GRIMES and TAMARA GRIMES, individually and as subrogors and FARM BUREAU INSURANCE COMPANY as subrogees,

Plaintiffs,

-vs-

ALAN DOUGLAS THISSE and DOUGLAS ALAN THISSE,

Defendants.

Joined with,

MICHAEL GRIMES and TAMARA GRIMES,

Plaintiffs-Appellees,

STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF TRANSPORTATION, a Dept. of the STATE OF MICHIGAN,

Defendant - Appellant.

_____/

Supreme Court No.127901
COA NO: 249558
LC No. 00-69126 NI
Hon. Geoffrey L. Neithercut

Court of Claims No. 02- 67 MD
Hon. William E. Collette

PLAINTIFFS'-APPELLEES' BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

Respectfully submitted:

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Oral Argument: January 10, 2006

Dated: January 4, 2006

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TABLE OF CONTENTS

G. W. CARAVAS & ASSOCIATES, P.C.
22070 S. NUNNELEY ROAD □ CLINTON TOWNSHIP, MI 48035 □ (586) 791-7046

G. W. CARAVAS & ASSOCIATES, P.C.
22070 S. NUNNELEY ROAD □ CLINTON TOWNSHIP, MI 48035 □ (586) 791-7046

INDEX OF AUTHORITIES

Michigan Case Law

Unpublished Law:

G. W. CARAVAS & ASSOCIATES, P.C.
22070 S. NUNNELEY ROAD □ CLINTON TOWNSHIP, MI 48035 □ (586) 791-7046

Michigan Statutes

G. W. CARAVAS & ASSOCIATES, P.C.
22070 S. NUNNELEY ROAD □ CLINTON TOWNSHIP, MI 48035 □ (586) 791-7046

Michigan Court Rules

G. W. CARAVAS & ASSOCIATES, P.C.
22070 S. NUNNELEY ROAD □ CLINTON TOWNSHIP, MI 48035 □ (586) 791-7046

STATEMENT OF THE BASIS OF APPELLATE JURISDICTION

The jurisdictional statement made by Appellant in Appellant's Brief is complete and correct.

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STATEMENT OF QUESTION INVOLVED

I. **DOES A CLAIM FOR FAILING TO MAINTAIN A DESIGNED IMPROVED SHOULDER IN REASONABLE REPAIR FALL WITHIN THE HIGHWAY EXCEPTION TO GOVERNMENTAL IMMUNITY AS IT APPLIES TO STATE AND COUNTY HIGHWAY AUTHORITIES, BECAUSE A DESIGNED SHOULDER IS PART OF THE IMPROVED PORTION OF THE HIGHWAY DESIGNED FOR VEHICULAR TRAVEL?**

Trial Court Answered: **YES**

Plaintiffs-Appellees Answered: **YES**

Defendant-Appellant Answered: **NO**

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G. W. CARAVAS & ASSOCIATES, P.C.
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COUNTER STATEMENT OF FACTS

The Accident:

Appellee accepts Appellant's statement of facts with the following exceptions:

This case arose out of a collision which occurred on Friday, March 24, 2000, at around 7:50 a.m. on northbound I-75 just north of the Holly Road entrance in Genesee County, Michigan. Plaintiff, Michael Grimes, was traveling on northbound I-75 having just entered the expressway from the entrance ramp. As he was traveling in the eastern-most lane, his vehicle was struck by a car driven by Defendant, Alan Thisse (**Appendix 1b-16b - Police Report).**

Defendant Thisse testified he was traveling north on I-75 returning from work, when he struck a mound of dirt or gravel and a bumpy area of road which caused him to go off on to the left shoulder next to the western-most lane of northbound I-75. As his wheels dropped off the edge of the paved shoulder to the compacted gravel shoulder, he attempted to re-enter the through travel lanes, in doing so he encountered a 7 to 8 inch drop from the edge of the asphalt portion of the paved shoulder, where it meets the compacted gravel shoulder. **(Appendix 25b-27b - Accident scene photographs)**. Defendant Thisse explained that as he hit the 7 to 8 inch lip, between the asphalt and the compacted gravel shoulder his vehicle kind of "hopped" as the wheels hit this lip.**(Appendix 21b-24b - Alan Thisse Deposition pp. 128-131).** This caused Thisse to lose control of his vehicle, cross back onto the three-lane highway of I-75 and strike Plaintiff Grimes' vehicle in the far right lane in a nearly T-bone configuration. **(Appendix 23b-24b - Alan Thisses Deposition pp. 130-131)**. He then diagramed this area of the roadway, which is attached as **Appendix 28b - Deposition Exhibit 1 - drawing by Alan Thisse)**. Thus, Defendant Thisse's vehicle was completely on the designed improved portion of the shoulder when he lost control.

G. W. CARAVAS & ASSOCIATES, P.C.
22070 S. NUNNELEY ROAD □ CLINTON TOWNSHIP, MI 48035 □ (586) 791-7046

Another witness to the collision, testified as to what had occurred. Melissa Scheck, who was traveling ahead of the vehicle being driven by Defendant Thisse, saw it veer sharply onto the shoulder, and she noticed initially, that there were two wheels off of the paved shoulder on the compacted gravel shoulder, and then, as the car spun to the side, it came perpendicular to the road and went back across three lanes of traffic (**Appendix 31b - Deposition of Melissa Scheck pp 6-9).**

Interstate 75 northbound, at the location of this accident is three lanes wide with a combination of a MDOT designed shoulder consisting of a 4.5 feet of bituminous shoulder and 3.5 feet compacted gravel shoulder, by design the abutting surfaces were to be level against one another. (**Appendix 15a - Cross Section of I-75).** At the time of the accident and for over thirty days it had a 7 to 8 inch drop. **Appendix 43b-44b, Affidavit of Consulting Engineer, Duane Dunlap).** There is a curve in the road near the area of the accident, as well as an emergency vehicle turnaround where the Thisse vehicle left the roadway. **(Appendix 25b-27b - Accident scene photographs)**.

Plaintiffs'-Appellees' complaint alleges that this accident was proximately caused by the failure of MDOT to maintain the improved portion of the highway in reasonable repair, which included the shoulder which was designed for vehicular travel. MDOT failed to maintain the compacted gravel portion of the shoulder reasonably level and consistent with the paved portion of the shoulder where the two meet, as designed and in accordance with its shoulder maintenance procedures; such that it was reasonably safe and convenient for public travel as required by MCL 691.1402 sec. 2. (1). **(Appendix 33b - 36b - Maintenance Procedure).** The failure to maintain and repair this areas resulted in a 7 to 8 inch drop between the two surfaces that was a proximate cause of the Thisse vehicle losing directional control and crossing over striking the vehicle operated by Plaintiff Grimes. **Appendix 43b-44b , Affidavit of Consulting Engineer, Duane Dunlap).** This failure proximately resulted in severe and catastrophic injuries to the Plaintiff,

rendering him paralyzed from the chest down and will be wheel chair bound for the balance of his life. (As shown in the MDOT's shoulder cross reference as, **Appendix 15a - MDOT's shoulder cross reference),** the section of I-75 where the incident occurred is designed as an eight foot wide combination asphalt and compacted gravel shoulder that is to be flush with one another. Plaintiffs-Appellees do not allege the improved shoulder was defectively designed, but rather MDOT failed to properly maintain and repair the improved shoulder. This failure to maintain and repair the designed improved shoulder is evidenced by the Defendant-Appellant's own maintenance requirement that does not allow a 7 inch drop off from the paved shoulder to the compacted gravel shoulder. **(Appendix 33b-35b - Maintenance Procedure Manuel).**

The Trial Court's Opinion:

Appellee objects to Appellant's characterization of the opinion of the Trial Court since this does not express the Court's complete reasoning. The Trial Court relied upon the *Nawrocki/Evens*[1] cases in their interpretation of MCL 691.1402 that there is a duty for the state to maintain or repair the physical structure of the roadbed surface paved or unpaved designed for vehicular travel. The Trial Court relied upon *Meek v Dep't of Transportation 240 Mich App 105;* 610 NW2d 250 (2000) that the Supreme Court in *Gregg* [2]recognized that the shoulder is a part of the improved portion of the highway for vehicular travel. The Trial Court recognized that Defendant did provide design plans for the shoulder of the expressway at issue which certainly demonstrated that the roadway was designed with a shoulder that was intended for vehicular travel. The Trial Court also recognized that the shoulder could be paved or unpaved in accordance with *Nawrocki* and that MCL 691.1402

[1]*Nawrocki/Evens v Shiawassee Cty Rd Comm, 463 Mich 143; 615 NW2d 702 (2000)*

[2]*Gregg v State Higyway Dept, 435 Mich 307; 458 NW2d 619 (1990).*

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22070 S. NUNNELEY ROAD □ CLINTON TOWNSHIP, MI 48035 □ (586) 791-7046

refers to the: "improved portion of highway," the Court opined that the shoulder is not a natural condition , it is something that man did to improve the highway usage. **(Appendix 4a-5a - Trial Court Transcript pp 6,7)**. The Court also went on to find that MCL 247.660 (C) in section 0, when referring to preventative maintenance referred to the roadway system and its appurtenances. That the preventative maintenance which included appurtenances: "means an accompanying part or feature of something," which included shoulder resurfacing. That by these requirements it demonstrated that the legislature did include a shoulder as part of the existing roadway system. **(Appendix 6a - Trial Court Transcript p 8).**

The Court also distinguished the *McIntosh v Dep't of Transportation (on remand) , 244 Mich App 705,; 625 NW2d 123 (2001)* case raised by the Defendant, since it involved a median that was neither improved nor an appurtenances to the roadway, as well as other matters raised by Defendant such as: traffic lights, culverts and embankments that are not an issue. The parties and the Court recognized that this case applied only to the shoulder. **(Appendix 7a - 8a Trial Court Transcript pp9-10). Opinion of the Court of Appeals:**

Appellee takes issue with Appellant's summary of the Court of Appeals opinion because the Court of Appeals also relied upon *Nawrocki,*v *Macomb Cty Rd Comm, 463 Mich 143; 615 NW2d 702 (2000)* in its interpretation of MCL 691-1402(1) where the Supreme Court found that there is an exception to governmental immunity for failure to maintain and repair the actual physical structure of the roadbed, surface, paved or unpaved designed for vehicular travel. In addition it relied upon *Gregg, supra; Meek, supra* and *Soule*.[3] The Court of Appeals furthermore found that

[3]*Soule v Macomb Cty Bd of Rd Comm, 196 Mich App 235; 492 NW2d 783 (1992)* Meek *v Mich Dept of Trans*, 240 Mich App 105; 610 NW2d 250 (2000):

G. W. CARAVAS & ASSOCIATES, P.C.
22070 S. NUNNELEY ROAD □ CLINTON TOWNSHIP, MI 48035 □ (586) 791-7046

the *Nawrocki* court did not overrule *Gregg,* and that the Trial Court properly denied Defendant's Motion for Summary Disposition on the basis of governmental immunity.

Defendant-Appellant filed a timely appeal of right with the Michigan Court of Appeals. The parties briefed the issues in detail and oral argument was not held pursuant to MCR 7.214(E). On December 16, 2004 a Court of Appeals panel consisting of Judges Markey, Fitzgerald and Owens issued a PER CURIAM, UNPUBLISHED opinion that was carefully reasoned. After discussing the Supreme Court's opinions in *Nawrocki/Evens* and *Gregg*, the Court held that, for purposes of the highway exception to governmental immunity, "the shoulder of a highway is part of the improved portion designed for vehicular travel." **(Appendix 11a-12a - COA Opinion/Grimes v MDOT)**. The Court of Appeals affirmed the trial court.

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SUMMARY OF ARGUMENT

On March 24, 2000, Plaintiff Michael Grimes was involved in a catastrophic accident while traveling northbound on I-75 resulting in paralysis from his chest down. The accident was through no fault of his own. Defendant Alan Thisse was also operating a vehicle northbound on I-75 when he swerved to avoid some debris on the road which resulted in traveling on the shoulder. As he attempted to enter the through lanes of traffic his tires encountered a 7 to 8 inch drop off which resulted in him losing control of his vehicle, crossing three lanes and striking the vehicle operated by Mr. Grimes.

The shoulder involved had been improved by MDOT with a redesign that increased the width of it. The shoulder was comprised of approximately 4.5 bituminous material and 3.5 feet of Class A compacted gravel. It is where these two surfaces meet is where Defendant Thisse encounter the drop off. MDOT designed this to be flush. Poor maintenance allowed it to fall in disrepair. This drop off far exceeds any allowable tolerances for a differential in height.

This action was timely filed against MDOT under MCL 691.1402 as an exception to governmental immunity. The highway shoulder had been redesigned and was part of the redesigned improved portion of the highway. The highway under the vehicle code, is the entire width between the boundary lines of every way publically maintained, when any part of it is open for purposes of vehicular travel. The exception to governmental immunity, however, does not apply to the full width of the highway system but rather, MCL 691.1402 limits the exception to "the improved portion of the highway designed for vehicular travel." This phrase, is not limited to through travel lanes but rather, refers specifically to the improved highway designed for vehicular travel. MDOT does not contest the shoulder is an improved portion of the highway. It takes the position the exception applies only to through lanes. The legislature never narrowed the exception to only a through travel

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lane but rather, utilized more expansive terms of an improved portion of the highway that was designed for vehicular travel. Clearly not only was this shoulder designed by MDOT's engineers, but by their own acknowledgment was in accordance with AASHTO . The design text sets forth a variety of uses of the shoulder, all of which refer to vehicles traveling upon it. The statute refers to the highway, not the through travel lanes. It is Plaintiffs 'position it encompasses all of the surface beds that are interconnected and make up the highway roadway as a unit. That being the shoulders and the through lanes. The shoulders are specifically designed for vehicular travel since they serve many purposes for vehicles entering upon them. Whether by use of emergency vehicles, motorist taking evasive actions, refuge, detour of traffic or the many other ways in which vehicles travel upon shoulders. Plaintiffs are not arguing that all shoulders throughout the state should be treated the same as falling within governmental immunity; but as to those shoulders, such as this one, that meet all the requirements of it being an improved portion of the highway that was designed for vehicular travel, then it meets the exception and liability may be imposed upon the State for failure to maintain it in reasonable repair, it as an exception to governmental immunity. Since approximately 1971 it has been recognized that shoulders are designed for vehicular travel and, therefore, under the highway exception. The legislature has over the years enacted several amendments narrowing the scope of governmental liability relating to the highway exception but has not amended the statutory provision to exclude shoulders in response to the decades of decisions. *Gregg at 314.*

In the Supreme Court case of *Gregg* decided in 1990 , it held that shoulders are part of the improved portion of the highway that are intended for public travel and must be maintained consistent with the statutory authority. This finding was premised that a shoulder is "designed for vehicular traffic although not of the same character as vehicular traffic on the paved portion of the highway," *Gregg at 314.* In *Nawrocki* the Supreme Court in 2000 reaffirmed that one looks to

the location of the dangerous or defective condition to determine if it is an area within the improved portion of the highway designed for vehicular travel, not otherwise expressly excluded. If so, a claim may be advanced against the governmental agency as an exception to governmental immunity. *Nawrocki at 170-172.*

Defendant MDOT's suggestion that areas such as grassy medians may be equated to shoulders is misplaced since such medians are not designed for vehicular travel and are outside the improved portion of the highway. Likewise, right of ways, easements or other instrumentalities outside of the traveled portion or an area where the agency specifically puts in devices to prevent motorists from traveling upon it do not constitute exceptions to governmental immunity since they are not designed and/or intended for vehicular travel.

It is Plaintiffs' position in looking at this particular stretch of highway with a designed improved shoulder for vehicular travel that it is within the statutory requirements that it be maintained in reasonable repair so it is reasonably safe and convenient for public travel. A such, Plaintiffs have stated a valid claim against the Defendant in avoidance of governmental immunity.

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ARGUMENT I

A CLAIM FOR FAILING TO REPAIR AND MAINTAIN A DESIGNED, IMPROVED SHOULDER IN REASONABLE REPAIR IS WITHIN THE HIGHWAY EXCEPTION TO GOVERNMENTAL IMMUNITY AS IT APPLIES TO STATE AND COUNTY HIGHWAY AUTHORITIES, BECAUSE A GOVERNMENTAL DESIGNED SHOULDER IS PART OF THE IMPROVED PORTION OF THE HIGHWAY DESIGNED FOR VEHICULAR TRAVEL.

STANDARD OF REVIEW

A question of statutory construction is reviewed by the Court de novo. *McAuley v General Motors Corp, 437 Mich 513, 518*; 578 NW2d 282 (1989); *Oakland Cty Bd of Cty Rd Comm v Michigan Property & Casualty Guaranty Ass'n, 456 Mich 590, 610; 575 NW2d 751 (1998); Kokx v Bylegna, 241 Mich App 655, 661; 617 NW2d 368 (2000).* The determination of the applicability of the highway exception to governmental immunity is a question of law subject to review de novo on appeal. *Meek v Mich Dept of Trans*, 240 Mich App 105; 610 NW2d 250 (2000). A motion that was filed under MCR 2.116 (C)(7) tests whether a claim is barred because of immunity granted by law, and requires consideration of all documentary evidence filed or submitted by the parties. *Wade v Dep't of Corrections, 439 Mich 158, 162; 483 NW2d* 26 (1992). In determining whether a party is entitled to judgment as a matter of law under MCR 2.116 (C) (7), a court must accept as true a plaintiffs' well-pleaded factual allegations, affidavits, or other documentary evidence and construe them in plaintiffs' favor. *Brennan v Edward D Jones & Co, 245 Mich App 156, 157; 626 NW2d 917 (2001), quoting Jackson Co HOG Producers v Consumers Power Co, 234 Mich App 72, 77; 592 NW2d 112 (1999).*

A. A Designed Improved Shoulder Is a Part of the Improved Portion of the Highway Designed for Vehicular Travel.

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This action against Defendant-Appellant MDOT involves a portion of the I-75 highway system which is exclusively within the jurisdiction of MDOT. The state highway system was specifically designed with a shoulder on the western most side of the through lane that was comprised of 4.5 feet of bituminous and 3.5 feet of compacted gravel shoulder. Where the two sections of the shoulder meet, being of different composition, it was designed to be relatively level with each other and was to be maintained relatively level where the two surfaces meet. **(Appendix 15a - Cross Section of I-75) (Appendix 33b-36b - Maintenance Procedures).** It is also pointed out that this shoulder was improved over the preexisting shoulder which was 3 foot bituminous. In effect the state originally had an improved shoulder in this area and before this accident occurred, undertook additional highway modifications and improved the shoulder further containing compacted gravel and partial paving. As such, there were improved shoulders along this highway system which were improved upon again, long before this accident occurred. The shoulder was a part of the highway system and for vehicular travel. Under these facts MDOT is required under MCL 691.1402 to maintain the shoulder in reasonable repair and liability exists for breach of that duty. MCL 691.1402 is an exception to governmental immunity.

It is essentially MDOT's argument that the shoulders of northbound I-75 are not designed for vehicular travel, and thus, they must not be considered as part of the highway to be maintained in reasonable repair. This conclusion flies in the face of: undisturbed case precedent of this Court involving road shoulders; the clear language of the statute; intent of the legislature; the documents provided by MDOT and plain common sense.

Let us now look to the statutory language.

1. Statutory Language:

It is well recognized that under the Governmental Immunity Act, MCL 691.1407 governmental agencies such as MDOT are immune from tort liability when engaged in the exercise or discharge of a governmental function except in those situations where an exception has been carved out. *Weakley v Dearborn Hts (on remand) 246 Mich App 322, 325; 632 NW2d 177 (2001).* In further analysis of this matter before the Court it is important to point out that the highway which includes its shoulder was specifically designed by MDOT. That is to say, this appeal is addressing a situation in which the shoulder was designed as a part of the overall highway system where this accident took place. Not only was it designed, it was also to be maintained. **(Id. Appendix 15a-33b, 36b - Cross section of highway).**

Before analyzing the exception to governmental immunity involving highway situations, let us first look to the Governmental Tort Liability Act (GTLA) where the term *highway* is defined. This is found at MCL 691.1401(e).

> '(e) "highway" means a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, cross walks and culverts on the highway. The term highway does not include alleys, trees, and utility poles.

It is important in reviewing this language that included within the definition of the highway that it adds to it other installation that are open for public travel, that being: bridges sidewalks, trailways, cross walks and culverts, all of which, however, must be on the highway to be within the definition.

With this definition let us now turn to what is commonly referred as the highway exception which is found at MCL 691.1402 Sec. 2. (1). It provides in part as follows :

> Except as otherwise provided in Sec 2a , : each governmental agency having jurisdiction over any highway, **shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel.** A person who sustains bodily injury . . . by reason of failure of any governmental agency to keep a highway under its jurisdiction in reasonable repair, and in condition reasonably safe

G. W. CARAVAS & ASSOCIATES, P.C.
22070 S. NUNNELEY ROAD □ CLINTON TOWNSHIP, MI 48035 □ (586) 791-7046

> and fit for travel, may recover the damages suffered by him or her from the governmental agency. . . The duty of the state and county road commissions to repair and maintain highways, and the liability for that duty extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks or any other installation **outside** of the improved portion of the highway designed for vehicular travel. (Emphasis added).

For purposes of an exception to governmental immunity the legislature excluded certain fixed objects such as: sidewalks, trailways, cross walks or other installations **outside** of the improved portion of the highway designed for vehicular travel. The way MCL 691.1402 is drafted it applies to that part of the definition of a highway that involves vehicular travel. The reason I refer to that part of the definition of a highway is because of in the Motor Vehicle Code the generalized definition of a highway contained in MCL 257.20 includes the entire width between the boundary lines of every way publically maintained. As such, for a general definition of highway it is more than simply the traveled lanes but rather from one boundary line to another that is maintained. By definition includes right of ways, easements and etc. The exception to governmental immunity , however, is far more limited than to the overall definitional highway in general. MCL 691.1402 makes it clear that the duty to maintain highways: "extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, cross walks, or other installation outside of the improved portion of the highway designed for vehicular travel. So when the legislature is referring to a highway, it narrowed the liability of MDOT to that part of a highway that has been improved and designed for vehicular travel. That as an exception to governmental immunity the governmental agency having jurisdiction over the highway is responsible to maintain it and keep it in reasonable repair so it is reasonably safe and convenient for public travel. This duty extends only to the **improved portion of the highway designed for vehicular travel**. It did not limit the travel

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22070 S. NUNNELEY ROAD □ CLINTON TOWNSHIP, MI 48035 □ (586) 791-7046

to through traffic lanes, only, as the MDOT is requesting of this Court to so interpret. Rather, simply that it is an improved portion that was **designed for vehicular travel.**

Under the facts of this case, it clearly includes a shoulder that is improved, and designed for vehicles to travel upon it. Just as an aside and not raised by MDOT; the dissent in *Gregg* referred to a shoulder definition within the Motor Vehicle Code at 257.59a . This definition only refers to a shoulder that is not designed for vehicular travel. The shoulder in the case now before this Court was so designed and maintained by MDOT. This is supported by MDOT's own attachments of designing in accordance with the guidelines of AASHTO. **(Appendix 17a - 23a - AASHTO).** As can be seen, that definition does not fit this improved portion of the highway. So use of the term shoulder may be a misnomer because what we are specifically referring to is a form of an extension of the highway for vehicles to travel upon. It was so designed for vehicular travel and, therefore, it does not fit within the definition of MCL 257.59a. As such, that particular definition that does not correlate with the extension of the highway, since the extension (shoulder) was actually created for vehicles to travel upon. Furthermore, this definition is contained within the Vehicle Code but not within the GTLA. As such, if there is a valid reason not to follow a definition outside of a specific act it need not be followed. *Gregg at 321.* And for this case, it should not be followed because the definition applies to a shoulder that is not designed for vehicular travel but yet, the shoulder in this case, as well as so many shoulders throughout the state are in fact **designed for vehicular travel.** This will be discussed further in the brief. MDOT, however, does not dispute that this shoulder is a part of the improved portion of the highway.[4]

It is recognized there is not an affirmative duty on a governmental agency, as MDOT, to design a shoulder for every roadway. *Soule v Macomb Cty Bd of Rd Comm'rs, 196 Mich App 235;*

[4]Defendants' brief pp 4, 7, 13, 15, 17, 18 and 22.

G. W. CANVAS & ASSOCIATES, P.C.
22070 S. NUNNELEY ROAD ☐ CLINTON TOWNSHIP, MI 48035 ☐ (586) 791-7046

492 NW2d 783 (1992). But in situations where the shoulder has been specifically designed for a vehicle to travel upon it, within the overall design of the highway, then the legislature has imposed the duty upon the governmental agency to maintain and repair that portion of the highway. MDOT wishes to draw a distinction between a shoulder and a through lane but the legislature, however, has not drafted such a distinction for purposes of an exception, and looks to the highway as being one unit including all which has been designed as a unit for vehicular travel. As such, when one looks at a shoulder for purposes of an exception to governmental immunity one may not catagorize all shoulders in general but rather for there to be liability it must fall within the criteria as set forth in the statute, that is; a design that is a part of the improved highway with recognition that there will be vehicular travel upon it. The State would have the Court do that which the legislature did not , and that is limit its liability to through lanes only, which is not in the statute. It asks of this Court to completely disregard the statutory language that imposes liability upon it for that which is designed for a vehicle to enter upon. What MDOT fails to address, as it relates to this case, is that even if it wishes to a draw distinction as to a through lane and a shoulder that, nonetheless, it is required to repair and maintain the shoulder where this accident occurred. Recall the statute refers to **improved portion of the highway** designed for vehicular traffic. Even under the MDOT's argument, the shoulder is a portion of the highway, it was designed, improved, and was for the purpose for vehicular travel upon it.

2. The Shoulder Was Designed and Improved by MDOT:

In the brief filed by MDOT it was critical of the *Gregg* Court because it did not look as to what they referred to as the insight of the MDOT engineers. Needless to say, this is not a matter of "insight" which may be self serving, since MDOT is a party to an action, but rather of statutory construction. Throughout MDOT's brief it continuously intermixes design defect arguments with

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22070 S. NUNNELEY ROAD □ CLINTON TOWNSHIP, MI 48035 □ (586) 791-7046

failure to maintain in reasonable and repair. In fact in section 5 of its brief it makes a passing comment that any lay person may critique a local road regarding its safety features and then goes on to refer to highway engineers as those that design the highways. MDOT is well aware that Plaintiffs are not claiming a design defect. For that matter design defects are not within the exception for governmental immunity. *Evens, supra at 183-184.* Also see *Ulrich.* [5]

The justices on the *Gregg* court were correct in their interpretation of the statutory exception and recognized that which is commonsense; that shoulders do accommodate vehicular travel upon them. Particularly when the shoulder is designed as a unit within the highway system.

But let us look to the AASHTO (American Association of State Highway and Transportation Officials), policy manual and the language contained therein that MDOT adheres to. The very documents upon which it cites to this Court, serves it no purpose. **(Appendix, p 16a-23a AASHTO).**

By the very definition contained within the text, a shoulder is a part of the highway system. It provides in part as follows:

> A shoulder is a portion of the **roadway**[6] contiguous with the traveled way that accommodates stopped vehicles, emergency use, and lateral support of sub-base, base and surface courses.

Although the handbook offers certain examples in which a shoulder is used, the Court is also well aware that shoulders at times are specifically traveled upon when used to detour traffic upon

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[5] Ulrich v Dept of Transportation, Court of Appeals No: 252525 unpublished opinion issued April 14, 2005. MDOT cited Ulrich in its brief. There the Court of Appeals recognized that the actual claim by the plaintiffs relating to the highway was based upon a design defect that allowed water to collect on the road. Since it was not designed for proper drainage the claim did not fall within the exception to governmental immunity. **(Appendix 40a p 1 Ulrich unpublished opinion).** What is of significance, is that once again the appellate courts recognized in accordance with *Gregg, supra* and *Soule, supra* that a shoulder or roadway is an "improved portion of a highway designed for vehicular travel." **(Appendix, 40a - Ulrich unpublished opinion).**

[6] MCL 691.1401(e) a road by definition is a highway.

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them if there is construction, accident, or lane closure . When it refers to emergency use it is not limiting itself to situations where a motorist may take evasive action, but also one routinely sees governmental vehicles such as police cruisers, ambulances and fire department vehicles driving upon a shoulder that is contiguous with the traveled way. Tow trucks travel upon shoulders to reach an accident scene. Operators of vehicles that drift one way or the other will enter upon shoulders, vehicles making a turn or entering or leaving a curve and not staying within the lane, enter upon shoulders. It is a daily occurrence that vehicles travel upon shoulders. Even under the facts of this case, Mr. Thisse while attempting to avoid debris in the roadway entered upon the shoulder and thereby lost control because of the failure to maintain it. But as stated, the State loses its governmental immunity when the shoulder is designed for the purpose of accommodating vehicular travel. This is precisely what this case is about.

But let us look to the AASHTO pages that MDOT considered to be relevant as it relates to a design engineer. This is important because for there to be an exception it must be an improved portion of the highway designed for vehicular travel. It has been conceded by MDOT that they did design this shoulder. But yet, it wants this Court to conclude that this shoulder does not fall within the exception for governmental immunity. When shoulders are designed, as here, let us look to the purpose. In listing the benefits of a shoulder we are referred to AASHTO pg 316 (Appendix, 19-1). It states in part as follows:

> **Well designed and properly maintained shoulders are needed on rural highways within an appreciable volume of traffic, on freeways, and on some types of highways. There advantages include:** Emphasis added.
>
> By the very definition shoulders are needed as a part of a safe highway system.

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AASHTO, *Id.* provides the engineer, as well as this Court, the advantages of a well designed and properly maintained shoulder. Let us look at but a few that MDOT acknowledges are applicable to shoulders. It provides in part as follows:

- Space is provided away from the traveled way for vehicles to stop because of mechanical difficulties, flat tires, or other emergencies.
- Space is provided for motorists to stop occasionally to consult road maps or for other reasons.
- Spaces is provided for evasive maneuvers to avoid potential crashes or reduce there severity.
- Highway capacity is improved because uniform speed is encouraged.
- Space is provided for pedestrian and bicycle use, for bus stops, for occasional encroachment of vehicles, for mail delivery vehicles, and for detouring of traffic during construction.

These are just some of the reasons that vehicles travel upon shoulders.

By AASHTO's own definition this designed and improved shoulder where the accident occurred, falls squarely within the exception for governmental immunity.

MDOT throughout its brief perpetuates several critical flaws in its argument concerning the facts of this case. It fails to recognize that this shoulder was in fact designed as a portion of the roadway, which by its own policy manual, is needed. It fails to recognize that this shoulder being designed and needed was precisely for vehicles to travel on it, although not as a through lane of traffic but certainly as a requisite element of this highway system for vehicular travel. It continuously obfuscates it argument shifting between design and its duty and obligation to maintain in reasonable repair that which has already designed and in place. It attempts to treat all shoulders, including those not designed, as one in the same; whether it be along the edge of a rural road or a highway. **In so doing it mis-directs the focus of this case; that at this particular accident scene the shoulder was in fact designed for vehicular traffic to travel on for all of the reasons and many more that it has brought to the Court's attention through the AASHTO handbook.**

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Shoulders have a very specific purpose. Since they do not carry the same volume of traffic, the depth of the concrete not being the same as the traveled lane, matters not. But vehicular traffic does travel upon them which results in shoulders being paved, or having compacted shoulder gravel. This is all part of the design of the improved portion of the highway. The legislature drew no such distinction between through travel lanes and shoulders for vehicular travel , but rather addressed highways and those portions of it that were designed for vehicular travel. It is quite disingenuous for MDOT to argue to this Court that a shoulder is not designed to be traveled upon, but yet attaches its handbook that uses as a guideline that specifically defines "a shoulder is the portion of the roadway" that in fact accommodates a wide array of situations in which vehicles travel on it. What is also of interest is that MDOT readily concedes that a combination of a designed asphalt and compacted gravel shoulder, comprising the shoulder structure is traversable. **(Defendant's brief p. 15).**

Once again let us look at Defendants own attachment being excerpts from AASHTO **(Appendix 21a AASHTO).**

It provides in part as follows:

> If shoulders are to function effectively, they should be sufficiently stable to support occasional vehicle loads in all kinds of weather without rutting. Evidence of rutting, skidding, or vehicles being mired down, even for a brief seasonal period, may discourage and prevent the shoulder from being used as intended.

What MDOT does not refer the Court to is another paragraph within that section that provides as follows:

> Experience on heavy- volume facilities shows that, on occasion, traffic will use smooth-surfaced shoulders as through-traffic lanes. **(Appendix 21a - AASHTO)**

It also makes reference that on certain roads where there is no indication as to the edge, a paved shoulder is desirable because it is a continuation. **(Id. Appendix 21a)**. As such, any

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suggestion by MDOT that in certain situations, as in this one, shoulders are specifically not designed for vehicular travel is without merit.

What is also of importance, and directly related to this case is another section contained within AASHTO. This refers specifically to the issue of maintenance or repair. AASHTO in its policy on geometric design of highways and streets stated as follows:

> **All types of shoulders should be constructed and maintained flush with the traveled way pavement if they are to fulfill there intended function. Regular maintenance is needed to provide a flush shoulder. Unstabilized shoulders generally undergo consolidation with time, and the elevation of the shoulder at the travel way edge tends to become lower that the traveled way. The drop-off can adversely affect driver control when driving on the shoulder at any appreciable speed.** In addition, when there is no visible assurance of a flush stable shoulder, the operational advantage of drivers staying close to the pavement edge is reduced. (Emphasis added). **(Id. Appendix 21a).**

Shoulders are a unit within the highway system that by its very existence, the intended function is for vehicles to travel upon them, and care must be taken to insure that they are maintained to be reasonably safe, since this is an improved portion that was designed in contemplation and recognition that vehicular traffic will travel upon them.

Another confusion that MDOT perpetuates is to suggest that a shoulder is not traveled on because one may get a ticket. There are certainly rules of the road that should be followed concerning through lanes. But no one would suggest that one may not enter upon a shoulder for the variety of reasons already set forth in this brief. It is not uncommon to have traffic redirected on to a shoulder for construction or due to other impediments in a through lane. The legislative enactment does not refer to rules of the road but rather whether or not a portion is improved and designed for vehicular travel, if so it must be maintained and kept in reasonable repair such that it is reasonable safe and convenient for public travel. **This** shoulder at **this** accident scene precisely falls within the exception giving rise to a claim against MDOT under MCL 691.1402.

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3. Defendant MDOT's Median/Shoulder Analogy Lacks Merit:

MDOT has attempted to draw an analogy between medians and shoulders, but in so doing has missed the vital distinction that in this case the shoulder was improved and designed as a part of the highway system for vehicular traffic. A grassy, expansive median, is separate and distinct. MDOT argues that if designed and improved shoulders must be maintained, then likewise this would apply to medians. This argument is completely without merit. Defendant MDOT cites to the Court two cases where a median was not considered to be an exception to governmental immunity. It is understandable as to why the Court of Appeals found in each of the cases that the median did not fall within the exception. In the matter of *McIntosh , supra*, it involved a situation where a motorist that had originally been traveling eastbound , lost control of the vehicle, entered the center grassy median, crossed it and struck vehicles in the westbound lanes of I-96. In that action plaintiff alleged that the highway was defective because the median should have been wider or a barrier should have been installed. The Court of Appeals in following *Evens*, stated in part as follows:

> The state and county road commissions' duty, under the highway exception, is only implicated upon their failure to repair or maintain the actual physical structure of the roadbed surface, paved or unpaved, designed for vehicular travel, which in turn proximately causes injury or damage. *Nawrocki/Evens*, at 183.

As the Court correctly pointed out, the grassy area was outside the actual physical structure of the roadbed. Recall that MCL 691.1402 (1) specifically excluded installations outside of the improved portion of the highway. The Court of Appeals stated that it was obvious that this grassy area was outside the actual physical structure of the roadbed surface that was designed for vehicular travel. In effect, it was not a road surface condition. Furthermore, any allegations about the width or the lack of a median barrier are design features and there is no duty under the highway exception

to governmental immunity to correct such alleged defects in design. The Court of Appeals, therefore, found that plaintiff failed to plead in avoidance of governmental immunity. *McIntosh, supra 705.*

The other case cited by Defendant is *Fogarty v Dep't of Transportation 200 Mich App 572; 504 NW2d 710 (1993).* This case likewise involved a grassy median separating the north and southbound lanes of I-75. The Court of Appeals recognized the MCL 691.1402 (1) did not apply to installations outside the improved portion of the highway. Furthermore, the legislative intent was to impose a duty to keep the improved, traveled portion of the roadbed of the highway that was designed for vehicular travel in repair. Without even having to address the question of whether or not the claim was defective design, this Court specifically found that a grassy median was not a portion of the roadbed designed for vehicular travel. The Court of Appeals found the exception not to apply and as such, MDOT was afforded the protection of governmental immunity. *Id., 573-574.*

Any argument, therefore, by MDOT that medians would be included within the exception if shoulders are, is an argument which is completely without merit. Two Court of Appeals panels, one of which relying upon the *Evens* and each upon the statutory language has clearly set forth that the State has the protection of governmental immunity for injuries or damages being proximately caused by claims asserting either a design defect of a median or for a median that has not been maintained or repaired. The reason being; because these medians were clearly outside of the improved portion of the highway for vehicular travel and, therefore, does not qualify as an exception.

Defendant also cites to this Court *Steveson v City of Detroit, 264 Mich App 37 ; 689 NW2d 239 (2004).* The Court of Appeals in that action looked to a strip of grass between a public road and a sidewalk. This case involved the repair of a water main on a grassy strip between the sidewalk and

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the street. The defendant in the action was the City of Detroit. As such, although MCL 691.1402 (1) refers to governmental agencies, the part of the statute which this appeal is directed to controls county road commissions and the State of Michigan. *Steveson* case the City of Detroit is a municipal corporation, so plaintiff Steveson was contending that liability may be imposed because it was a natural extension of a sidewalk.[7] (A different section of the statute directed to municipalities). The argument being raised is that the grassy area was an extension of the sidewalk. The *Steveson* court opined that this grassy area did not even meet the definition of a "highway" within the meaning of MCL 691.1401(e) and as such, is not within the highway exception to governmental immunity. As stated, in *Steveson* they were attempting to hold the City liable as an extension of the sidewalk, MCL 691.1402a. This is a completely different issue from the statutory provision now before this Court, being MCL 691.1402.

Let us now look at another case that Defendant has relied upon. This is the matter of *Wolfe v Dep't of Transportation (***Appendix 29a - 39a -Wolfe Unpublished opinion)** [8]. It involved a situation where a motorist while proceeding southbound on a divided highway entered an area that was described as: a "twelve - foot- wide 'median', with two four- foot- wide valley gutters on either side of a four - foot - wide "median" that is slightly raised. The raised portion of the median had corrugated rumble strips beginning two - hundred feet before the bridge pier, which are designed to "audibly alert motorist using the median lane as they approached the north pier." There was also a seventy-five-foot gap in the median approximately 530 feet north of the bridge pier as well as other

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[7] MCL 691.1402 a.

[8] Wolfe, et al. v Dep't of Transportation, Unpublished Opinion of the Court of Appeals Docket No: 245546, et all., dated July 1, 2004; lv to Appeal Denied, 472 Mich 885; 695 NW2d 67 (2004)(footnotes omitted).

highway markings. The operator of the vehicle entered upon and remained within this median area and struck the bridge pier. The MDOT, through its civil engineers, testified that the median was specifically not designed or intended for vehicular travel. This was supported by their placement of corrugated rumble strips and yellow lines. Furthermore, the paved median which consisted of a valley gutter and rumble strips installed to warn motorists that they were traveling on an area not so intended. With those designs being incorporated into the median the Court concluded that this median was: "designed to prevent drivers from traveling on that area." This particular case serves the Defendant no benefit. What it does establish is that if an area is not meant to be driven upon then MDOT takes special steps to advise motorist of same. What was included in this highway was specific design features to prevent or warn motorist that they should not be where they were operating the vehicle at the time. As such, under MCL 691.1402 it clearly was demonstrated that this particular stretch of roadway was **not** designed for vehicular travel. Therefore, governmental immunity applies. The facts in *Wolfe* have no relationship to this case other than demonstrating that there may be times that MDOT specifically takes steps to keep vehicles from proceeding along a certain route. But as it relates to shoulders by there own design criteria as set forth in AASHTO, shoulders are to accommodate vehicular travel. Certainly there may be areas that a designed improved shoulder should not be entered upon but then, it is within the design of that area by the engineers at MDOT to so designate that it is not meant to have any vehicular traffic as they did with the median in the *Wolfe* case. As the Court of Appeals in *Wolfe* stated: "we must focus on the design

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of the highway (i.e. the markings and construction of the roadbed) and state law. (MCL 257.644).[9] Id. **(Appendix 34a - Wolfe unpublished opinion).**

4 Defendant's Argument Re: Failure to Design Is Not Before The Court and Defendant's Argument Regarding Discretion Is Contrary To MCL 691.1402 Regarding Repair and Maintenance:

Plaintiffs have never raised in the lower or Appellate Court that a design defect falls within the exception to governmental immunity; recognizing that *Evens* has already held that design defects are not within the meaning of MCL 691.1401. This matter before the Court is premised upon MDOT's failure to maintain or repair the improved designed shoulder. By its own design, AASHTO guidelines and periodic undertaking recognized the necessity to maintain this shoulder for safe operation of vehicular travel. Defendant places a section in its brief at heading 8. p 20 suggesting that Plaintiffs are seeking to have MDOT redesign shoulders. There is no such request being made. MDOT is fully aware that the law in this state does not impose any liability upon it for an improperly designed shoulder and places no liability upon it for having no shoulder whatsoever. Furthermore, this is not a matter of what Plaintiffs seek, but rather the maintaining of an action against MDOT that is authorized by legislative enactment. The claim arises out of the negligence of the State (MDOT) that is within the exception for governmental immunity. This argument in paragraph 8, p 20 MDOT smacks of "crying wolf" when it is fully aware that for decades liability may be imposed for injuries arising out of shoulders that have been designed, as this shoulder had been with dimensions, gradients, sub-bases, and surfaces. The writer on behalf of Defendant goes

[9] This statute refers to situations where a highway has been divided in to two roadways by leaving an intervening space or by a physical barrier. It prohibits the parking, driving over, across or within the dividing space, barrier, or section. This is subject to certain exceptions. This statute is not relevant to the matters before this Court.

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to great lengths in its discussions about shoulders and in the maintenance of same. The brief is written as if this Court and the Legislature for no less than 24 years have not considered an improved shoulder to be part of the traveled portion of the highway. This has been the law in this State for almost a quarter of a century but yet Defendant-Appellant writes the brief acting as if this is some new concept, and the State has not been in compliance with the directives of the Legislature and the Supreme Court for the last 24 years. Such a suggestion is contrary to its own design material, construction and maintenance of shoulders. Shoulders that by its own guidelines are a necessity for a safe overall highway system.

The Defendant acts as if Plaintiffs are attempting to change the law in this state when in fact the Plaintiffs, the trial court, and the Court of Appeals have all recognized that the shoulder in this case was designed and improved. This shoulder falls squarely within the exception to governmental immunity. This is not a matter of redesigning shoulders but simply maintaining and repairing those that MDOT deem to be necessary when they were designed and made a part of the highway system. Where has there been the flood gate of litigation and payments that arose from this statute and the opinion by the *Gregg* court. All MDOT has suggested to this Court is that there has been a half dozen shoulder cases recently pending in the Courts against MDOT, in its footnote 61and without any real description. Some appear to be design cases, another involves drain holes on the edge of a bridge, one is the *Ulrich* decision another, involves drainage and at best there may be two cases involving a gravel shoulder. Two cases that it can draw the Court's attention to hardly constitutes an avalanche of litigation. But this is not the issue nor should it be an issue. The issue before the Court is whether or not the designed shoulder which is for vehicular travel on this particular highway system and not maintained or repaired is within the exception for governmental immunity. Plaintiffs

maintain that it is; as well as the lower court, Court of Appeals and case law since 1971. The issue as to whether or not the state breached its duty in its failure to repair or maintain is appropriately left for a jury determination. This self-serving claim being presented by a governmental body is no more than requesting this Court to legislate. This Court has always maintained a stoic and strong tradition that it will not become the legislative arm of the government but rather, interpret the statutes as written. If the State dislikes, that for decades the statute has required it to maintain shoulders and reasonable repair, and that the Supreme Court has interpreted the necessity for it to do so since at least 1990, it has had ample opportunity to persuade the legislature to draft the exception otherwise. The legislature speaks on behalf of the people of the State of Michigan and their safety as a primary consideration of it. By MDOT's own acknowledgment as to their reliance upon AASHTO ,shoulders do fulfill a function for vehicular travel. As such, in those situations in which a shoulder, as in this case, has been designed as a part of the highway system, MDOT is fully aware that regular maintenance is needed to provide a flush shoulder. **(Appendix 21a -AASHTO).** It has been aware that it owes a duty to maintain and repair those improved designed shoulders. Defendant perpetuates the obfuscation of trying to confuse the difference between maintenance or repair with that of design. By way of example the Defendant cites to this Court *Hanson v Mecosta County Road Comm'n 465 Mich 492; 638 NW2d (2002).* It is conceded that case stands for the proposition that improper design and construction is not an exception to governmental immunity.

But this case, however, is not a case involving allegations of design defect. MDOT does recognize that under MCL 247.651that the State Highway Commissioner is responsible for the construction, **maintenance** and improvement in accordance with the provisions of the act. MCL 247.651a. (Emphasis added). The State Transportation Department is responsible for bearing the

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entire cost of maintaining, in accordance with standards and specification of the department, all state trunk line highways, MCL 247.651 b.

It is also recognized that under existing case law that in designing a highway system a shoulder may or may not be incorporated. But it is suspected that this part of Defendant's argument may have been lifted from another brief because it does not address the issues that are specifically before this Court because there is no claim that there **should have been** a shoulder. The Plaintiffs are not "second-guessing the engineering principles applied to the shoulder involved in this action". This is not a case where it is being argued that there was improper discretion utilized in the design of this shoulder. Discretion in the design of this shoulder is not an issue before the Court.

It is, however, important to point out to this Court that repair and maintenance is not a matter of discretion as to whether it will or will not do so. In the matter of *Wilson v Alpena Co Rd Comm, 263 Mich App 141;687 NW2d 380 (2004),* the Road Commission took the position that since the road was deteriorated to such an extent that there was no point in salvaging it, so it had no duty to repair or maintain the road. In this regard, the Appellate Court did not accept the argument that the Road Commission had discretion in deciding that it was not feasible to continue maintenance and thereby abandon its responsibility. The Court in interpreting *Nawrocki* recognized that it is within the governmental agency's decision to improve, augment or expand a highway and not for the Court. But that statement in *Nawrocki* was simply that the courts could not require a specific method of repair or maintenance. *Wilson* went on to say:

> But it does not follow that because the method of repair is left to the agency responsible for maintaining a road, the entity could chose to do nothing when by doing nothing, the agency is simultaneously violating its duty to keep the road "in reasonable repair so that it is reasonably safe and convenient for public travel." MCL 691.1402 (1).

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The statute at issue confers an affirmative duty on the governmental agency having jurisdiction over a highway to maintain the highway in reasonable repair. *Id.*

As such, any suggestion by MDOT that maintenance or repair is discretionary just as design of a system may be, is completely without any merit and is absolutely contrary to MCL 691.1402. Since this is such a blatantly incorrect suggestion on its part, it can only be assumed that it simply be considered a mistake on its part and incorporated a portion of a different brief. Particularly, because later in its section it does acknowledge that the maintenance or repair is not a matter of discretion and is a basis for tort liability as an exception to governmental immunity. **(Defendant's Brief p 22).** But what is significant is that Defendant does recognize that a shoulder is a part of the improved highway system. **(Defendant's brief p.21).** In Defendant's example of items incorporated in a highway system, it added guard rails and certain other instrumentalities that clearly would not fall within the exception of governmental immunity. Shoulders, however, do. This is why it is suspected that Defendant has taken an excerpt from another case involving principles of design and placed it within this brief. The Defendant does recognize that the shoulder in this case is not outside the improved portion of the highway system.

Furthermore when one speaks of a shoulder being designed there may be situations in which a shoulder may drop off up to 3 inches in depth for a significant continuous length , but if that is to occur then there is appropriate signage. But what is significant, however, is that for a drop off to be 3 inches and allow to remain, it must result from engineering judgment for this to be a part of the design criteria. This is discussed in the Manual on Uniform Traffic Control Devices section 2 c .26 referring to shoulder signage. W8-9a. **See Appendix 26 a - UTCD p2C-11) .** The matter now

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before the Court, however, does not involve a situation where MDOT designed any drop off whatsoever. As stated, in a design engineered situation the drop off may only be up to 3 inches. In this case, however, the design was for a flush surface and the compacted gravel and bituminous that was meant to be maintained in that configuration. The 7 to 8 inch drop off was the result of deterioration and lack of proper maintenance and repair.

5. The Nawrocki/Evens Decisions:

MDOT argues that *Nawrocki v Macomb Cty Rd Comm,* and *Evens v Shiawassee Cty Rd Comm, 463 Mich 143; 615 NW2d 702 (2000)* [for consistency with Def's brief, hereinafter referred to as "*Nawrocki/Evens.*"], effectively refocused what the Legislature intended with *MCLA 691.1402,* and thus Plaintiffs' claim must be dismissed. With respect to shoulders of an expressway, Defendant is wrong. The Supreme Court in *Nawrocki/Evens*, narrowed existing case law, which had interpreted *MCLA 691.1402,* to include, **"special points of hazard"** and those traffic control or other devices that are an integral part of making the roadways reasonably safe and convenient for vehicular travel. See *Pick v Szymczak, 451 Mich 607;548 NW2d 603 (1996*).

In *Pick*, this court had reversed a decision of the Court of Appeals and held the road commission responsible for not having posted traffic control signs at an intersection. When deciding *Nawrocki/Evens,* this Court stated that its opinion, *Pick* had established too broad of an interpretation of the highway exception to governmental immunity, particularly with respect to claims of poor signage, lighting and the like. This court stated:

> The state and county road commissions' duty, under the highway exception, is only implicated upon their failure to repair or maintain the actual physical structure of the roadbed surface, paved or unpaved, designed for vehicular travel, which in turn proximately causes injury or damage. *Nawrocki/Evens*, at 183.

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The court went on to state:

> A plaintiff making a claim of inadequate signage, like a plaintiff making a claim of inadequate street lighting or vegetation obstruction, fails to plead in avoidance of governmental immunity because signs are not within the paved or unpaved portion of the roadbed designed for vehicular travel. *Nawrocki/Evens,* at 183.

Plaintiffs'-Appellees' claims herein, are not for a sign, street lighting, vegetation obstruction or other instrumentality not part of the portion of the highway designed for vehicular travel. Rather, Plaintiffs'-Appellees' claims are specifically regarding the designed improved shoulder as part of the highway system and the failure of Defendant-Appellant to maintain the designed shoulder for vehicular travel in reasonable repair so it was reasonably safe and convenient for public travel. The *Nawrocki* court parsed each sentence of the statutory clause to ascertain the scope of the exception. In so doing in the review of the fourth sentence it stated:

> We believe the plain language of this sentence definitely limits the state and county road commission's duty with respect to the *location* of the alleged dangerous or defective condition; (*Nawrocki, supra, 161-162).*

Just as in *Gregg* the *Nawrocki* court viewed the exception as to where the accident occurred and not necessarily the status of the person involved. Although *Nawrocki* involved a pedestrian stepping off the curb onto the roadway, it was not critical of *Gregg* in any respect and its conclusion that the shoulder constitutes an improved portion of the highway designed for vehicular travel.

In examining the Supreme Court decision of *Nawrocki/Evens,* it is important to note that the Supreme Court stated:

> **We have made great efforts to re-examine our prior collective and individual views on this subject** [highway immunity tort claims] **in order to formulate an approach which is faithful to the statutory language and legislative intent. Whenever possible and necessary, we have reaffirmed our prior decisions.** The consensus which our efforts produce today, should not be viewed as this court's

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individual or collective determinations of what would be most fair, or just, or the best public policy. *Nawrocki/Evens, at 149.* (Emphasis added).

In this regard, and of particular import to this case, is the fact that this Court in *Nawrocki/Evens* **did nothing to overrule prior decisions of the Supreme Court and Court of Appeals regarding shoulders**.

The court in *Nawrocki/Evens* took great efforts to review prior cases when reaching its holdings. The *Nawrocki/Evens*' opinion extensively discusses traffic signs, signals and points of hazard. There is no treatment of shoulders specifically, *except* to recognize that the *Gregg* Court determined that the bike path in that case was not an "installation", but was actually part of the roadway for immunity purposes because it was located on the shoulder close to the roadway. *Nawrocki/Evens*' at 164. In fact, using the express language in *Nawrocki/Evens*, (that the intent of *MCLA 691.1402* was to limit liability to the improved portion of the highway designed for vehicular travel), one can rightfully assume that the court and legislature intended for shoulders to be included within the definition of the "improved portion of the highway designed for vehicular travel." Since this court took such time to review all previous decisions, it must have been intimately aware of the line of cases regarding shoulders which impose liability upon Defendant MDOT to repair and maintain the shoulders in a reasonable repair so it is reasonably safe and convenient for public travel. Thus, Defendant herein, is responsible for the maintenance or repair of the designed shoulder along northbound I-75 which caused or contributed to Defendant Thisse's vehicle colliding with Plaintiff Michael Grimes, and causing his catastrophic injuries.

6 Pre and Post Nawrocki/Evens Interpreting Designed Shoulders as a Portion of the Highway Design for Vehicular Travel:

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The *Gregg* decision has been in effect for 15 years, furthermore, the *Gregg* Court specifically pointed out that since 1971 there has been appellate cases holding that the shoulder is a portion of the improved highway. Furthermore, since that time there has been several amendments narrowing the scope of governmental liability under the highway exception, and the legislature had not corrected those cases that concluded a shoulder is designed for vehicular travel. *Gregg, supra at 314.*

Notwithstanding this long line of cases the author on behalf of MDOT makes a blatant statement that the shoulder is not maintained as a travel lane. From what best that can be gathered from such a comment is attempting to draw a distinction as to the character of the vehicular traffic on a shoulder and a demarcated lane. As it relates to governmental immunity, however, there is no such demarcation as recognized in *Gregg* and the progeny of cases previously cited and no distinction by way of amendments by the Legislature to create such an alleged distinction. As discussed in *Gregg* shoulders are essential to a safe modern highway and in fact there is significant travel that takes place on it, albeit of a temporary sort. *Gregg, at 315.* In this case, the maintenance of the shoulder rests solely with the Defendant to fulfill the legislative intent: "to enhance the safety of public travel upon state owned highways." *Chaney, at 154.*

In *Gregg*, a cyclist brought suit against the State Highway Department for injuries suffered because of a pothole in a designated bicycle path located next to and connected with the road. The Highway Department moved for summary disposition asserting that its duty to maintain highways did not extend to bicycle paths. However, in *Gregg*, this court specifically found that the location of this particular bicycle path, next to the highway and on the paved shoulder, made the highway department responsible for his injuries since the area of the accident occurred on the shoulder, which

was designed for vehicular travel. That is to say that *Gregg* reached the conclusion through the interpretation of MCL 691.1402 that the shoulder was an improved portion of the highway designed for vehicular travel. *Gregg at 317.* The Gregg court recognized that the language in the statute of: "vehicular travel" did not limit the class of travelers who may recover damages. That is to say, "any person" qualifying under the statute may pursue a cause of action. But what is of significance is not necessarily the " any person" but rather that the words in the statute "designed for vehicular travel" describe and define the "improved portion of the highway" to which the duty of the governmental agency "to keep any highway under its jurisdiction . . . safe and fit for travel" applies. MCL 691.1402 *Gregg supra at 310.* In effect the *Gregg* court opined that it is the location of or where the unsafe or dangerous condition exists that determines whether or not there is an exception to governmental immunity, and concluded that the shoulder was a portion of the highway for vehicular travel.

In *Gregg* , neither the dissent nor the State Highway Department ever contended that the shoulder was not a part of the improved portion of the highway. It was the State's contention that the shoulder of the road was not designed for vehicular travel and existed for "**emergency accommodation**" only. *Gregg, at 311-313.* The State (MDOT) likewise is in this case not contending that a shoulder does not represent the improved portion of the a highway. **(Defendant's Brief p 4).** Rather, its appeal is limited to whether or not it was designed for vehicular travel. **(Defendant's Brief p 4).** Over fifteen years ago, the *Gregg* court recognized:

> In *Johnson v Michigan, 32 Mich App 37; 188 NW2d 33 (1971) (lv den) 385 Mich 762 (1971),* **the Court of Appeals observed correctly we think, that the shoulder from which the plaintiff was returning to the traveled portion of the road, like shoulders generally, was 'designed for vehicular traffic although not of the same character as vehicular traffic on the paved portion of the highway'.** Id., at 39.

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Other Court of Appeals panels, without exception, have followed that precedent. See *Van Liere v State Highway Dept, 59 Mich App 133; 229 NW2d 369 (1975), and McKee v Dept of Trans, 132 Mich 714; 349 NW2d 798 (1984).*

The dissent accurately points out that the Legislature has been quick to correct the result of Court of Appeal's decisions that have extended the §2 exception to governmental immunity. We find it persuasive that the Legislature has not included in those correcting amendments the result of an uninterrupted line of cases extending from 1971, that conclude that a shoulder is designed for vehicular travel. *Gregg* , supra at 314.

In discussing the dissenting opinion, this court stated:

Moreover, the contention that the Legislature did not intend to include highway shoulders under the §2 exception, has an obvious flaw: it flies in the face of common experience. Any motorist who has ever experienced a highway emergency understands that shoulders are essential to a safe modern highway. To get on or off a shoulder to stop, park or leave standing a vehicle, motorists must travel on the shoulder. ***Gregg, supra at 315.***

At the high speeds of modern vehicles, such an endeavor often results in significant travel, 'in the ordinary sense,' on the shoulder of a highway. Indeed, it seems quite extraordinary, if not fictional, to assume that vehicles do not travel on shoulders or that shoulders are not designed for vehicular travel, albeit of a temporal sort. ***Gregg, supra at 315.***. (Emphasis added).

At the time of the *Gregg* opinion there has already been 19 years of precedent that shoulders are designed for vehicular travel. *Gregg* was decided in 1990 and as such there is approximately 35 years of precedent in this regard. But what is also stressed to this Honorable Court that the shoulder involved in this case was in fact specifically designed as part of the highway system. **(Appendix, 15a - Cross Section of Highway).**

Furthermore, as the *Gregg* court noted that with speeds of modern vehicles a motorist who enters upon a shoulder will invariably travel a significant distance. Simply by way of example a vehicle traveling at 55 mph in 1 second travels a distance of 87.7 feet. At 70 mph a vehicle travels 102.6 feet per second. If a vehicle at 55 mph entered upon a shoulder for a period of only 3 seconds

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it would travel 242.1 feet and at 70 mph it would travel 307.8 feet in the same 3 second time frame. Or another way to view it slightly over the length of a football field. **(The Insurance Bar - Speed/Distance Chart - Appendix, 51 b).**

Keep in mind that despite this Court's narrowing of certain aspects of the highway exception in *Nawrocki/Evens,* the clearly stated and understood legislative purpose of the highway exception remains the same. That purpose is "**to enhance the safety of public travel upon state owned highways.**" *Chaney v Dept Trans,* 447 Mich 145, 154; 523 NW2d 762 (1994).

Defendant-Appellant goes to great lengths to argue that the Supreme Court in *Gregg*, was contorting its opinion by dismissing or explaining away conflicting law. However, it is Defendant-Appellant that is attempting at this time, to contort this Court's opinion in *Nawrocki/Evens.* The plain fact is that *Gregg,* and the long line of uninterrupted cases extending from 1971 that concluded a shoulder was designed for vehicular travel, was not affected by *Nawrocki/Evens*. MDOT throughout its brief referred to the *Gregg* court's struggle.

MDOT spends considerable time addressing the minority opinion in *Gregg*, when attacking the result of the majority. However, it does not explain why the *Nawrocki/Evens* court, after stating that it had gone to great lengths to review all of the precedential cases involving highways, did nothing to change to opinion in *Gregg.* The majority in *Nawrocki/Evens*, specifically identified a plethora of situations where it felt that previous decisions, specifically *Pick v Szymczak, supra.*, had been too expansive in accepting a variety of "creative and innovative theories." These decisions were specifically overruled or questioned. This court felt that traffic light, traffic sign and lighting cases were not intended by the legislature because the statute's language limited the exception to defects of the improved portion of the highway designed for vehicular travel.

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In fact, it is not the *Gregg* court that has struggled, but MDOT in trying to advance such an untenable position that a designed improved shoulder such as the one involved in this accident was not a portion of the highway designed for vehicular travel. This proposition on its behalf is directly contrary to the AASHTO guidelines, its engineering drawings, its own statements, excerpts from the Manual on Uniform Traffic Control Devices and common sense. The main fallacy with MDOT's position is that it attempts to equate all shoulders as the same whether designed or not designed. Their brief to this Court lacks focus that we are speaking about a shoulder that was improved and specifically designed as part of the highway system. The *Gregg* court recognized such a distinction. It was not a matter of that Court having difficulty in distinguishing cases, but rather, clearly distinguished situations in which there may or may not exist governmental immunity. Let us for a moment consider Defendant's argument where it is critical of the *Gregg* court where it distinguished *Roy v Dept of Transportation, 428 Mich 330; 408 NW2d 783 (1987).* MDOT's criticism is that it was distinguished because the bicycle path was "detached from the improved portion". MDOT's argument fails to demonstrate an understanding of the exception contained within MCL 691.1402. The legislature made it clear there was not an exception to governmental immunity for: "any other installation **outside** of the improved portion of the highway designed for vehicular travel." *(MCL 691.1402, emphasis added).* This is precisely what the *Gregg* court recognized as a distinguishing factor.

It was also critical of the *Gregg* court in its distinction of *Goodrich v Kalamazoo, 304 Mich 442; 8 NW2d 130 (1943)* this involved a situation where an accident occurred in the early 1940's involving a tree on the shoulder. What the *Gregg* court said in this regard is as follows:

> We would not disagree that a 3-foot-wide dirt and gravel shoulder adorned with an occasional tree is not "**designed** for vehicular travel" under today's statute or any statute. As in *Goodrich*, we would probably conclude that such a shoulder was also not a part of the "improved portion" of the highway. (Emphasis added). *Gregg, supra at 313.*

As the Court clearly can recognize, *Gregg* in looking at an early 1940 case opined that such a situation did not involve a designed shoulder and that such characteristics would not be an acceptable design under any statute. Once again, liability is imposed by failure to maintain or repair an **improved portion designed for vehicular travel**. MDOT certainly recognizes that shoulders are in fact designed, by its own standards and guidelines for vehicular travel. It is totally disingenuous for it to argue to this Court that shoulders are not designed for that purpose. MDOT wishes for this Court to do something the legislature specifically did not advocate. That is the segregating of the highway system as it relates to travel lanes verses the shoulder, which in this situation was clearly designed for vehicular travel. MDOT asked of this Court to give an interpretation that is clearly not in accord with the statutory language. The statute does not differentiate lanes. Rather it is very specific in referring only to the improved portion of the highway designed for vehicular travel. The legislature narrowed the definition of highway from that which is contained in MCL 691.1401 (e), but it still left the traveled portion of the highway as a unit. The inquiry is as to whether or not the area in which the injury occurred is part of the highway system designed for vehicular travel. It matters not is it is a through lane or a part of the highway system that functions in the many capacities that a shoulder does for vehicular travel

It is most damaging to MDOT's argument in this case that this Court, only four and a half years ago, in its *Nawrocki* decision, did not comment negatively on *Johnson, Gregg* or any their "shoulder" progeny. This Court did glowingly mention its earlier decision in *Gregg* with respect

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to its straightforward handling of the definition of "**any person**" under the statute[10]. *Nawrocki* at 162.

In *Soule v Macomb Cty Bd of Rd Comm, 196 Mich App 235; 492 NW2d 783 (1992),* the Court was faced with a case where the plaintiff claimed that the lack of a shoulder was a breach of the Road Commissions duty to provide a road which was reasonably safe and fit for vehicular travel. Though this Court determined that the failure to provide a shoulder was not a breach, the Court started its analysis by stating:

> **Clearly, the shoulder of the roadway is part of the improved portion of the highway designed for vehicular travel. *Gregg* v *State Highway Dept, 435 Mich 307; 458 NW2d 619 (1990).*** *Soule, at 237.*

As stated in *Meek , supra:*

> **The Supreme Court has recognized that the shoulder is part of the improved portion of the highway designed for vehicular travel.** *Gregg* v State Highway Dept, 435 Mich 307 (1990)]. *Meek*, at 106.

Plaintiffs realize that these cases pre-date *Nawrocki/Evens.* However, they reveal that the reach of *Gregg* was quite extensive. Clearly the *Nawrocki/Evens* panel of this Michigan Supreme Court would have been intimately aware of the number of cases that had previously held that a shoulder is part of the highway design for vehicular travel and that this Court did so as recently as 1990. Plaintiffs recognize that numerous cases have held that the failure to provide a shoulder is not a breach of the statutory duty to maintain safe roadways, and do not argue such a factual scenario

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[10]Narrow construction of highway exceptions to immunity does not guarantee "the state" victory. In both *Gregg* and *Nawrocki*, the governmental defendants sought to have a plaintiff pedestrian and cyclist barred from recovery because they were not motorists even though the actual language of MCL 691.1402 says that "a person" may so recover. The government lost those two cases because the "narrow" argument, like in this case, was simply wrong and contrary to the language and intent of the statute.

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in this case. Rather, Plaintiffs state a claim which has been recognized by this Court since 1971, and was not changed by the decision of *Nawrocki/Evens*.

Following this precedent and *Gregg,* supra., the Court of Appeals again, in the unpublished opinion of *Weiss v Eaton Cty Rd Comm, et al, 1999, WL 33430021, No. 210105 (1999),* stated that the shoulder of the highway is part of the improved portion of the highway designed for vehicular travel. **(Appendix 37b-38b, Weiss Unpublished opinion).**

In another recent unpublished opinion by the Court of Appeals, *Kozlowski v Dept of Trans, 2002 WL 1608240, No. 232174 (2002),* **(Appendix 40b - 41b, Kozlawski unpublished opinion).** a panel consisting of Judges Talbot, Cooper and D. P. Ryan (Circuit Judge sitting by assignment), must have interpreted the Michigan Supreme Court's decision in *Nawrocki*, just as the court below and the Plaintiffs have argued herein. That opinion states:

> Liability under the Highway Exception extends only to the traveled portion, paved or unpaved, of a roadbed actually designed for public vehicular travel. *Nawrocki v Mac Cty Rd Comm, 463 Mich 143, 180; 615 NW2d 702 (2000); Ridley v Detroit (on remand).* **A shoulder is part of the highway designed for vehicular travel. *Gregg v State Highway Dept, 435 Mich 307; 458 NW2d 619 (1990).*** However, the failure to provide a shoulder is not a breach of the statutory duty to maintain reasonably safe roadways under *MCL §691.1402. Soule v Macomb Cty Bd of Rd Comm, 196 Mich App 235, 238; 492 NW2d 783 (1992).* (Emphasis added).

It has also been recently recognized in *Ulrich, supra* in following *Nawrocki* that the shoulder is within the exception of governmental immunity. That Court stated in part as follows:

> In *Nawrocki v Macomb Co Rd Comm'rs , 463 Mich 143, 160, 161-162; 615 NW2d 702 (2000)*, our Supreme Court held that, under the highway exception, a governmental agency has a duty to keep the "improved portion of the highway designed for vehicular travel" in reasonable repair, i.e. , suitable for vehicle travel. In *Gregg v State Highway Dept, 435 Mich 307, 314-316; 458 NW2d 619 (1990)*, it was determined that the shoulder of a roadway is an "improved portion of the highway designed for vehicular travel." See, also, *Soule v Macomb Co Bd of Rd Comm'rs, 196 Mich App 235, 237; 492 NW2d 783 (1992).*

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At least three very recent panels of the Court of Appeals, (*Kozlowski*, supra., *Ulrich,* and the present case), started their analysis by recognizing the decision of this Court in *Nawrocki/Evens,* and going on to state that a shoulder is part of the highway design for vehicular travel, it is clear that the lower court and Plaintiffs' assessment of *Nawrocki/Evens* is accurate. It appears that this Court's Decision in *Nawrocki/Evens* purposely did nothing to change the long line of precedent which held that a shoulder is part of the highway designed for vehicular travel. This result is consistent with the generally narrow view of exceptions espoused by this Court in *Nawrocki/Evens*. MDOT's position in this case would inappropriately restrict access to the civil courts when the clear language of MCL 691.1402 includes designed improved shoulders. Indeed, many different versions of the legislation have made no changes to the statute concerning highway shoulders when they have been quick to "correct" other parts of the statute based upon judicial interpretations.

7. The Trial Court's Reliance Upon MCL 247.660(C):

The Trial Court Judge, the Honorable Geoffrey L. Neithercutt, provided a concise and compelling analysis when he denied MDOT's Motion for Summary Disposition in this matter. **(Appendix 4a-8a Court Opinion/Motion Hearing Transcript) .** After following *Gregg , supra,* and noting that the evidence in this case clearly supported that the shoulder at issue was particularly designed and was part of the "improved portion of the highway", Judge Neithercutt continued to examine definitions concerning the MDOT's obligations and duties contained in a series of funding statutes including MCL 247.660 (C) . **(Appendix 5a-6a - Trial Transcript June 16, 2003 hearing pp 7 , 8** - Judge Neithercutt's opinion). MCL 247.660 sets up the Michigan Transportation Fund. It is a lengthy and complex statute concerning the nature of and amounts of funding for the

Department of Transportation. It ultimately assigns 39.1% of all state transportation funds to MDOT to perform its required tasks.

Judge Neithercutt stressed in his opinion that the Department of Transportation was funded to and obligated to, perform preventative maintenance on the highway system, which means:

> "A planned strategy of cost-effective treatment to an existing roadway system and its appurtenances that preserve assets by retarding deterioration and maintaining functional conditions. . .". MCL 247.660 (C)(o).

Judge Neithercutt noted that preventive maintenance was defined by our legislature as specifically including "shoulder resurfacing". See MCL 247.660(C)(o)*(viii)*. He appropriately reasoned that this section showed that the Michigan Legislature clearly defined a highway shoulder as part of the existing roadway system. It is implicit in the Trial Court's analysis of this statute that, because the legislature intended that the Department of Transportation to be responsible for and maintain the shoulders as part of the existing roadway system, it was not a reasonable interpretation of the statute in question to assume or imagine that a specifically designed shoulder was somehow not part of the "improved portion of the highway designed for vehicular travel".

Aside from making a passing reference to the trial court's reasoning on this issue, MDOT chose not to analyze, of MCL 247.660 (C)(o) *(viii)*.[11] But where specific mention is made by the legislature of shoulder resurfacing and maintenance in a section describing all the roadway maintenance that is funded by the tax payers and expected from the MDOT , it would be a huge

[11]MDOT did briefly note the *Gregg* majority's discussion of *another* statute, former MCL 257.1501 (K), that defined shoulder as "that portion of a highway...on either side of the roadway which is normally snowplowed for the safety and the convenience of *vehicular traffic"*, and then discounted the statute solely because it had been moved from the Motor Vehicle Code to the Natural Resources and Environmental Act. Nonetheless, it remains a relevant statutory definition found in the laws of this state at MCL 324.82101 (1)(s).

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stretch of our general statutory construction rules to treat the shoulder differently with respect to immunity unless the clear language of the statute in question required it.

As noted above and throughout this brief, based upon the words chosen by the legislature in MCL 691.1402, it is clear that it did not intend to grant the State immunity for poorly maintained road shoulders when it was excepting immunity for poorly maintained highways.

i. The Statutory Maxim "Expressio Unius Est Exclusio Alterius":

The goal of construing a statute must be to discern and give effect to the intent of the legislature by examining the best evidence of the legislatures intent, the words of the statute itself. *Neal v Wilkes, 470 Mich 661, 665; 685 NW2d 648 (2004); AFSCME v City of Detroit, 267 Mich App, 255, 260; 704 NW2d 712 (2005).* No judicial construction is necessary if the language of the statute is unambiguous. *DiBenedetto v West Shore Hosp, 461 Mich 394, 402; 605 NW2d 300 (2000).*

Michigan also recognizes the statutory construction maxim "expressio unius est exclusio alterius", which means that the express mention in a statute of one thing implies the exclusion of other similar things. *Bradley v Saranac Comm Schools, 445 Mich 285, 298; 568 NW2d 650 (1997); AFSCME, supra at 260.* The statute at issue in this case, MCL 691.1402 (1), notes that state and county road commissions are required to repair and maintain highways and that the liability for that duty extends only to the "improved portion of the highway designed for vehicular travel". The legislature specifically excluded sidewalks, trailways, cross walks, or other installations outside of the improved portion of the highway. . .". It is clear that the legislature did not include shoulders when it noted that sidewalks, trailways, and crosswalks were not part of the improved portion of the highway designed for vehicular travel.

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Based upon the maxim "expressio unius est exclusio alterius", it is appropriate to presume that the legislature wanted the state and county road commissions to remain liable for alleged failure to repair and maintain the designed shoulder of the highways. The legislature made the effort to list specific areas that might be thought in a broad since to be designed and part of the highways system and excluded them. These areas are "sidewalks, trailways and cross walks". The legislature clearly would have included designed shoulders of a highway if it wanted to when it originally decided that the Department of Transportation and County Road Commissions would not be responsible for alleged failure to maintain sidewalks, trailways and cross walks. In light of the legislature's failure to include shoulders along with "sidewalks, trailways and cross walks", shoulders must still be maintained and governmental immunity does not apply.

Furthermore, the legislature has been aware at least since this court's decision in *Gregg*, supra, in 1990, that the Supreme Court and other judicial interpretations of this statute were not including designed highway shoulders in the listed exceptions found in MCL 691.1402. The legislature's lack of action to amend the statute leads to the conclusion that the judiciary to date has interpreted MCL 691.1402 correctly. Finally, when a statute contains a specific provision *and* a general provision, the specific provision will be controlling if there is any ambiguity. *Gebhardt v O'Rourke, 444 Mich 535, 542;-543; 510 NW2d, 900 (1994).* The legislature's specific inclusion of sidewalks, trailways, and cross walks as areas that were "outside of the improved portion of the highway designed for vehicular travel" underscores the legislatures clear intent **not** to include designed highway shoulders in the grant of governmental immunity.

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CONCLUSION

Over the passage of time, the obvious intent of the legislature is to leave the shoulder as part of the improved portion of the highway designed for vehicular travel. Not only could the Legislature have addressed the decision of this Court in *Gregg* by adopting new legislation post-1990, this Court did not take action to narrowly constrict the definition of the improved portion of the highway designed for vehicular travel when it decided *Nawrocki/Evens*.

Indeed, Defendant-Appellant is seeking of this Court to upset the consistency of results, authority and sound legal logic that has guided the Courts and litigants for so many years and implemented the legislative intent: "to enhance the safety of public travel upon state owned highways." To date the Courts and the legislature have left the *Gregg* line of cases and reasoning intact and undisturbed. Thereby providing continued guidance and continuity for the court's, litigants and the governmental authorities as to duties and responsibilities. As discussed in this brief, the generic term of highway is from one boundary line to another. The legislature narrowed the government exception to the improved portion of the highway designed for vehicular travel. MCL 691.1402(1) the legislature used the term "highway" several times. At no time, however, did it refer to travel lanes, only. It basically states to look to the improved portion of the highway designed for vehicular travel. The improved portion, without question includes the shoulder. Under the facts of this case this improved portion was specifically designed to accommodate vehicular travel and in reality does have vehicles travel upon it. By MDOT's own arguments and attachments it is clearly demonstrated, that which we all know; shoulders along highways such as I-75 are designed and maintained to have vehicles enter on and travel upon them. When addressing the essence of *Nawrocki/Evens* opinion it reaffirms that one looks at the location

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of where the accident occurred. In effect, not every shoulder may qualify as being within the exception for governmental immunity but the shoulder in this case which is designed and has been improved upon, is clearly within the exception.

Finally, as noted by this Court in *Gregg* just fifteen years ago:

> "Moreover the contention that the Legislature did not intend to include highway shoulders under the (section) 2 exception has an obvious flaw: it flies in the face of common experience.
> Any motorist who has ever experienced a highway emergency understands that shoulders are essential to a safe modern highway. To get on or off a shoulder to stop, park, or leave a standing vehicle, motorists must travel on the shoulder.
>
> At the high speeds of modern vehicles, such an endeavor often results in significant travel, "in the ordinary sense," on the shoulder of the highway. Indeed it seems quite extraordinary, if not fictional, to assume that vehicles do not travel on shoulders or that shoulders are not designed for vehicular travel, albeit of a temporary sort. *Id. at 315.*

It is clear, that designed improved shoulders as in this case are part of the improved portion of the highway designed for vehicular travel, and thus, contemplated within the highway exception to governmental immunity.

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RELIEF REQUESTED

Plaintiffs-Appellees respectfully request that this Honorable Court to affirm the decisions of the lower courts and find that the shoulder in this case having been improved and designed for vehicular travel is within the exception to governmental immunity under MCL 691.1402.

Respectfully submitted:
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